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[REDACTED]

**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

MDV/172487

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**PRELIMINARY RECITALS**

Pursuant to a petition filed March 07, 2016, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Waukesha County Health and Human Services in regard to Medical Assistance (MA), a hearing was held on April 26, 2016, at Waukesha, Wisconsin.

The issue for determination is whether the agency properly determined that an annuity purchased by the Petitioner is a divestment for purposes of MA eligibility.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Petitioner's Representative:

[REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, Wisconsin 53703

By: [REDACTED]

Waukesha County Health and Human Services  
514 Riverview Avenue  
Waukesha, WI 53188

**ADMINISTRATIVE LAW JUDGE:**

Debra Bursinger  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Waukesha County. She is 75 years old.
2. On January 22, 2016, the Petitioner gifted \$284,062.48 to her son. The Petitioner does not dispute that this was a divestment of assets for purposes of MA eligibility.

3. On January 27, 2016, the Petitioner purchased an annuity with an effective date of January 27, 2016 in the amount of \$142,714.78 which pays \$3,998.98/month for 36 months. The Petitioner's first payment of \$3,998.98 was disbursed on January 27, 2016. The annuity has no cash surrender value. The annuity is irrevocable and may not be transferred, assigned surrendered or commuted during the Petitioner's lifetime. It is actuarially sound. It names the Wisconsin Department of Health Services Estate Recovery Program as the primary beneficiary. It was purchased through a life insurance company with proceeds from an individual retirement account.
4. On January 29, 2016, an application for MA was submitted on behalf of the Petitioner, requesting enrollment in a Community Waivers program.
5. On February 26, 2016, the agency issued a notice to the Petitioner

### **DISCUSSION**

When an individual, the individual's spouse, or a person acting on behalf of the individual or his spouse, transfers assets at less than fair market value, the individual is ineligible for MA coverage of nursing facility services. 42 U.S.C. 1396p(c)(1)(A); Wis. Stat. §49.453(2)(a); Wis. Adm. Code §DHS 103.065(4)(a); Medicaid Eligibility Handbook (MEH), § 17.2.1. Divestment does not impact on eligibility for standard medical services such as physician care, medications, and medical equipment (all of which are known as "MA card services" in the parlance). The penalty period is the number of days determined by dividing the value of property divested by the average daily nursing home cost to a private pay patient. MEH, § 17.5.2.2.

The MEH states, at § 17.2.1 that the purchase of certain types of assets, including annuities, can be considered a divestment even if for fair market value. Annuities are discussed further at § 17.11.

#### 17.11.2 Evaluating Irrevocable Annuities for Divestment

##### 17.11.2.1 Irrevocable Annuities that are not considered divestment:

a. Names "Wisconsin Department of Health Services Estate Recovery Program" (hereafter referred to as "the State") as the remainder Beneficiary if purchased or created on or after January 1, 2009. In those cases where there is a spouse, disabled child or minor child, the State is beneficiary in the second position;

AND

b. Is created from funds in a ROTH IRA , 408 IRA or other employer sponsored plan; or is purchased from a life insurance company or other commercial company that sells annuities as part of its normal course of business;

c. Is considered an individual retirement annuity (according to Sec. 408(b)) of the Internal Revenue Code of 1986 (IRC), or a deemed Individual Retirement Account (IRA) under a qualified employer plan (according to Sec. 408(q) of the IRC);

d. Provides substantially equal monthly payments with no balloon, deferred or graduated payments (variations in payment amounts due to changes in interest rates are allowed);

e. Is annuitized for the individual or spouse (currently issuing payments);

f. Is a period-certain annuity that will return the full principal and interest within the annuitant's life expectancy as listed in the Period Life Table (from socialsecurity.gov).

g. The number of months that annuity payments will be issued should be less than the number of months of the individual's life expectancy (multiply figure from the Period Life Table (from socialsecurity.gov) by 12).

It is undisputed that the annuity that is the subject of this case meets the criteria noted above. The agency argues that even though the purchase of the annuity meets the criteria above, it is a divestment under MEH, § 17.4 because the Petitioner concedes that she purchased the annuity with the intent to qualify for Medicaid.

The agency cites DHA cases in support of its position. In DHA Case No. 159940, the issue was whether the transfer of cash to various relatives of the Petitioner as gifts was a divestment. In DHA Case No. 165574, the issue was whether the purchase of a promissory note was a divestment. The agency further asserts that though “the annuity is not a divestment because it follows the letter of the law” but “the spirit of the law needs to be taken into consideration.”

The agency’s argument has no merit.

As noted by the Petitioner in its closing argument, the intent of a law is considered only when the statutory or rule language is ambiguous or not plain. In this case, MEH, § 17.11.2.1 is clear that an annuity that meets the criteria listed is not a divestment. The agency concedes the annuity in this case meets the criteria. Thus, the analysis is complete – the purchase of this annuity is not a divestment.

### **CONCLUSIONS OF LAW**

The agency did not properly determine that the annuity purchased by the Petitioner is a divestment.

**THEREFORE, it is**

**ORDERED**

That this matter is remanded to the agency to take all administrative steps necessary to re-determine the Petitioner’s MA eligibility based on the January 29, 2016 application filing date and based on a finding that the annuity in question is not a divestment. The agency shall issue a new notice to the Petitioner based on its revised determination with new appeal rights. These actions shall be completed within 10 days of the date of this decision.

### **REQUEST FOR A REHEARING**

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in

this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 27th day of May, 2016

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\sDebra Bursinger  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on May 27, 2016.

Waukesha County Health and Human Services  
Division of Health Care Access and Accountability  
[REDACTED]